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QUESTION PRESENTED

Whether, under the doctrine of intergovernmental immunity recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the minimum wage and overtime provisions of the Fair Labor Standards Act may constitutionally be applied to the employees of a publicly owned and operated mass transit system.

PARTIES TO THE PROCEEDING

In addition to the appellee named in the caption, appellees include the American Public Transit Association and Joe G. Garcia.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The amended opinion of the district court (App. A, *infra*, 1a-20a) is reported at 557 F. Supp. 445.[1] A prior judgment order issued by the district court (App. C, *infra*, 22a-24a) that was vacated by this Court (*Donovan* v. *San Antonio Metropolitan Transit Authority*, No. 81-1728 (June 7, 1982)) is unreported.

JURISDICTION

The amended judgment of the district court (App. D, *infra*, 25a-27a) was entered on February 18, 1983, effective February 14, 1983 (see note 1, *supra*). A notice

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[1] The district court issued a memorandum opinion and judgment on February 14, 1983, but it withdrew the opinion and judgment on February 18, 1983 (App. B, *infra*, 21a) and entered an amended opinion and judgment on that date. The court's February 18 order recites that the amended judgment shall "be effective as of February 14, 1983."

of appeal to this Court (App. E, *infra*, 28a-29a) was filed on March 3, 1983. On April 25, 1983, Justice White extended the time for docketing the appeal to and including June 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution, the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, and the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, are set forth in Appendix F, *infra*, 30a-36a.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. V) 201 *et seq.*, requires covered employers to pay their employees a minimum hourly wage and to pay them at no less than one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week. See 29 U.S.C. (& Supp. V) 206(a)(1) and 207(a)(1). The original version of the FLSA excluded states and their political subdivisions from the definition of an "employer" used in the minimum wage and overtime provisions; state and municipal employees were accordingly unprotected under these provisions of the Act. See 29 U.S.C. (1940 ed.) 203(d). In 1966, Congress extended the coverage of the FLSA in various respects and eliminated the previously applicable exemption as to virtually all employees of hospitals, institutions, and schools operated by the states and their subdivisions, whether operated for profit or on a nonprofit basis, that were deemed to be "[e]nterprise[s] engaged in commerce or in the production of goods for commerce." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Section 102(a), (b), and (c), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(1),

203(s)(4).[2] The constitutionality of this "enterprise concept" of coverage and of the inclusion of publicly operated schools, hospitals, and institutions under the Act was sustained in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).[3]

In addition to schools, hospitals, and institutions, the 1966 FLSA amendments extended coverage to employees of all transit companies "engaged in commerce" that are either publicly owned or privately owned but subject to state or local regulation. Pub. L. No. 89-601, Section 102(a) and (b), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(2).[4] However, the 1966 FLSA amendments did not provide overtime pay protection to drivers, operators, and conductors ("operating employees") employed by transit companies, public or private, brought under the Act. Pub. L. No. 89-601, Section 206(c), 80 Stat. 836, 29 U.S.C. (1970 ed.) 213(b)(7). The plaintiffs in *Maryland* v. *Wirtz* did not challenge the public transit employee provisions of the 1966 FLSA amendments, and the Court had no occasion to consider their validity. See

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[2] The effect of each of these provisions and their interrelationship is explained in *Maryland* v. *Wirtz*, 392 U.S. 183, 185-187 & n.4 (1968).

[3] The Court declined to consider, however, the statutory question whether publicly owned schools, hospitals and institutions characteristically are "engaged in commerce" and are, accordingly, subject to the minimum wage and overtime provisions of the Act, leaving that question open for case by case resolution. *Maryland* v. *Wirtz*, *supra*, 392 U.S. at 200-201.

[4] In 1961, Congress had extended the FLSA to provide minimum wage (but not overtime) protection to employees of certain private mass transit operators. See Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, Sections 2(c) and 9, 75 Stat. 65, 71-74, 29 U.S.C. (1964 ed.) 203(r), 213(a)(9), 213(b)(7). In 1966, Section 203(d) was amended to bring state or local government operated transit systems within the Act's definition of "employer." Section 203(r) was amended in 1966 to make clear that transit operations, whether public or private (but publicly regulated), are "enterprise[s]" within the meaning of the FLSA and, accordingly, that employees of a transit company engaged in commerce are entitled to the protections of the Act.

269 F. Supp. 826, 827 (D. Md. 1967), aff'd, 392 U.S. 183 (1968).

In 1974, Congress again broadened the coverage of the FLSA. This time virtually all public agencies and their employees were brought within the ambit of the Act. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, Sections 6(a)(1), (4), (5)(D) and (E), and (6), 88 Stat. 58-62, 29 U.S.C. 203(d), 203(r)(3), 203(s)(5), 203(x).[5] The 1974 amendments also set forth a schedule for phasing out the special exclusion from overtime coverage for transit operating personnel established in the 1966 amendments. Pub. L. No. 93-259, Section 21(b)(1)(3), 88 Stat. 68.

The 1974 FLSA amendments were broadly challenged by the states and their political subdivisions. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court overruled *Maryland* v. *Wirtz*, *supra*, and restricted Congress' power to extend the protections of the FLSA to public employees.[6] The Court held that the "constitutional doctrine of intergovernmental immunity" (426 U.S. at 837) bars application of the minimum wage and overtime provisions of the FLSA to "the States *qua* States" (*id.* at 847), "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions * * *" (*id.* at 852).

In overruling *Maryland* v. *Wirtz*, *supra*, the Court specified that the publicly operated "schools and hospitals involved in *Wirtz* * * * each provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855 (footnote omitted). The Court also listed "such areas as fire prevention, police

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[5] These provisions and their combined effect are described in *National League of Cities* v. *Usery*, 426 U.S. 833, 838-839 (1976).

[6] The plaintiffs in *National League of Cities* did not mount a specific challenge to the public transit provisions of the 1974 FLSA amendments or to the transit provisions of the 1966 FLSA amendments.

protection, sanitation, public health, and parks and recreation" as other examples of traditional state operations. *Id.* at 851, 855. However, the Court did not purport to offer "an exhaustive catalogue of [those] * * * activities * * * which are well within the area of traditional operations of state and local governments" and that accordingly may not be subject to federal commerce power legislation, where other elements of the test for immunity are satisfied. *Id.* at 851 n.16.

Although the Court thus left unsettled the status of federal legislation affecting a broad range of state governmental functions, it made clear that not all state activity is insulated from the reach of federal commerce power enactments. Indeed, the Court singled out one activity as outside the scope of the Tenth Amendment's protection: a state's "operation of a railroad engaged in 'common carriage by rail in interstate commerce * * *.'" *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 854 n.18, quoting *United States* v. *California*, 297 U.S. 175, 182 (1936). The Court commented that "California's activity [in operating a railroad] was not in an area that the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 n.18.

On remand for entry of an order implementing this Court's *National League of Cities* decision, the three-judge district court concluded that this Court's decision was "limited to invalidating regulation, under the commerce clause, of the hours and wages of those state and local government employees engaged in activities integral to and traditionally provided by government." *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705 (D.D.C. 1977). Recognizing the existence of "a gray area, which will require elucidation in the factual settings presented by future cases" (*id.* at 706), and troubled by the possibility that double damages could be sought against state and local governments for FLSA violations (see 29 U.S.C. (Supp. V) 216(b) and (c)), the district court concluded that "[i]t may be appropriate to pro-

vide some protection to the state and local governments" (429 F. Supp. at 706).

In response to the district court's request, the Secretary of Labor submitted a proposal to amend his FLSA enforcement policy statement, 29 C.F.R. Part 775, so as to provide for listing of governmental activities deemed to lie outside the scope of the states' Tenth Amendment immunity from application of the FLSA. The Secretary's proposal also indicated that he would not seek double damages for violations as to any period prior to the listing of a government activity as covered by the Act. The Secretary's proposal was approved by the district court (*National League of Cities* v. *Marshall*, *supra*, 429 F. Supp. at 706) and published as an interpretative regulation. See 29 C.F.R. 775.2(b) and (d), and 775.3(b). Pursuant to the approved procedure, on December 21, 1979, the Secretary of Labor amended his statement of enforcement policy to include local mass transit systems in the category of government activities not integral to a traditional government function and hence subject to the FLSA. 29 C.F.R. 775.3(b)(3).

2. Appellee San Antonio Metropolitan Transit Authority ("SAMTA") is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Cum. Supp. 1982) to serve the San Antonio metropolitan area. SAMTA began operations on March 1, 1978, when it acquired the facilities and equipment of the city-owned San Antonio Transit System, which had begun operations in 1959.[7] Prior to 1959 public transportation in San Antonio was provided by a private transit company.

Since its establishment SAMTA has received substantial federal financial assistance, in the form of grants

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[7] The San Antonio Transit System was operated pursuant to the terms of a private revenue bondholders' indenture with a local bank (App. A, *infra*, 7a n.4).

in aid for capital improvements and operating expenses, as well as technical assistance, under the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.* ("UMT Act"). During the first two fiscal years of SAMTA operations the Authority received non-capital grants of approximately $12.5 million, or 30% of its total operating expenses.[8] SAMTA's predecessor, the San Antonio Transit System, had also received substantial federal financial aid prior to the SAMTA takeover. During the period December 1970 through February 1980, SAMTA and its predecessor received $51,689,000 in federal grants, or approximately 40% of their total eligible projects costs of $130,922,194. Of this federal assistance, $31,040,080 represented capital grants under Sections 3 and 5 of the UMT Act; $20,620,270 was operating assistance under Section 5; and $28,654 was technical assistance (research, development, and demonstration grants) under Section 6 of the UMT Act.[9]

3. On November 21, 1979, SAMTA filed a complaint seeking a declaratory judgment that its operations are integral operations of a political subdivision of the State of Texas in an area of traditional governmental functions, and accordingly are exempt, under the rule of *National League of Cities*, from both the minimum wage and overtime provisions of the FLSA.[10] The Secretary

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[8] Brief in Support of SAMTA's Motion for Summary Judgment at 10 (filed Apr. 30, 1980).

[9] Urban Mass Transportation Administration, Office of Management Information Systems, List of All Grants for the City of San Antonio, Texas (Feb. 25, 1980) (Exhibit K to Defendant's Motion for Summary Judgment).

In addition, as of 1979 SAMTA had received federal funding commitments for acquisition of 325 new buses. Urban Mass Transportation Administration, Major Funding Commitments for Buses Since Feb. 1965, as of Sept. 30, 1979 (Exhibit L to Defendant's Motion for Summary Judgment).

[10] In its complaint (at ¶¶ 4-6), filed just before the Secretary published his enforcement policy respecting mass transit (see page 6, *supra*), SAMTA alleged that the Secretary had informally con-

of Labor counterclaimed against SAMTA for enforcement of the overtime and recordkeeping provisions of the Act. 29 U.S.C. 217.[11] The American Public Transit Association, a trade association of public transit operators, intervened as a plaintiff, supporting SAMTA, while Joe G. Garcia, a SAMTA employee, intervened as a defendant, supporting the Secretary.

On November 17, 1981, the district court denied the Secretary's motion for partial summary judgment and entered judgment for SAMTA. The court issued no opinion, but its judgment stated (App. C, *infra*, 23a) that local, publicly operated mass transit systems such as SAMTA constitute integral operations in an area of traditional governmental functions for purposes of applying the rule of *National League of Cities* v. *Usery*, *supra*. The district court accordingly concluded that the Secretary may not enforce the minimum wage and overtime pay provisions of the FLSA against SAMTA and other public transit operators.

4. The Secretary and intervenor-defendant Garcia appealed to this Court pursuant to 28 U.S.C. 1252. This Court vacated the district court's judgment and remanded the case for further consideration in light of the intervening decision in *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1981). *Donovan* v. *San Antonio Metropolitan Transit Authority*, Nos. 81-1728 & 81-1735 (June 7, 1982).[12]

5. Upon remand, the district court adhered to its conclusion that the minimum wage and overtime provisions

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cluded that mass transit operations were not within the sphere of intergovernmental immunity, and that employees of SAMTA had, on this basis, begun to assert a right to receive overtime compensation under the FLSA and had indicated their intention to seek remedial relief under the Act.

[11] SAMTA evidently paid its employees the minimum wage at the time in question.

[12] Justices Brennan, White, and Marshall would have noted probable jurisdiction and set the case for oral argument.

of the FLSA may not be applied to publicly owned and operated mass transit systems such as SAMTA (App. A, *infra*, 1a-20a). Although the district court acknowledged that "the historical record *is not* one of predominately [*sic*] public ownership and operation of transit services" (App. A, *infra*, 5a; emphasis in original), it concluded that mass transit "has traditionally been a state prerogative and responsibility" because private transit operations have generally been subject to state or local regulation (*id.* at 6a).

The district court recognized that under *United Transportation Union* v. *Long Island R.R.*, *supra*, the states cannot invoke Tenth Amendment immunity in circumstances where such immunity would "erode federal authority over previously private functions recently converted to public ownership" (App. A, *infra*, 6a). But the court distinguished *Long Island Rail Road* on the ground that the FLSA itself had only recently been extended to cover transit employees in the public sector (App. A, *infra*, 7a-8a). Because other federal commerce power legislation, the application of which to transit companies antedates that of the FLSA, expressly exempts public employers from coverage, the district court stated that "[n]o * * * federal authority exists to be eroded in the area of transit" (*id.* at 20a; see also 9a-10a).

Finally, the district court concluded that mass transit cannot satisfactorily be distinguished from fire prevention, police protection and other public services classified as traditional state functions in *National League of Cities* (App. A, *infra*, 11a-17a). The court thus rejected (*id.* at 13a-17a) the holding of *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), cert. denied, No. 82-701 (Jan. 17, 1983), that the critical role played by federal grant funds in stimulating and underwriting the conversion of transit systems to public ownership differentiates the emerging public role in transit operation from traditional state functions for purposes of delineating the scope of state immunity under the FLSA.

THE QUESTION IS SUBSTANTIAL

This case presents an important question concerning the authority of Congress to require maintenance of reasonable conditions of employment for a substantial class of working men and women employed by enterprises in interstate commerce. The decision of the district court that the protections of the Fair Labor Standards Act may not constitutionally be extended to the employees of publicly owned mass transit systems is contrary to the limiting principle, recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that confines the doctrine of intergovernmental immunity to traditional governmental functions. The district court's decision also disregards this Court's admonition that, in order to establish immunity from federal legislation under the doctrine of *National League of Cities*, a state employer must demonstrate that the legislation "affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678, 686-687 (1982), quoting *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 851. Moreover, the district court's decision is contrary to three decisions by the courts of appeals on the precise question presented. See *Alewine* v. *City Council*, 699 F.2d 1060 (11th Cir. 1983); *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983); *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), cert. denied, No. 82-701 (Jan. 17, 1983).[13]

As the courts of appeals have recognized, significant features of the local transit industry and the record of local government participation therein set public transit apart from those "core state functions" (*EEOC* v. *Wyo-*

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[13] The district court's ruling is also contrary to *Scholz* v. *City of LaCrosse*, No. 80-C-238 (W.D. Wis. Sept. 1, 1982), appeal pending, No. 82-2890 (7th Cir.); and *Francis* v. *City of Tallahassee*, 424 So. 2d 61 (Fla. App. 1982).

ming, No. 81-554 (Mar. 2, 1983), slip op. 9) that are generally immune from federal commerce power regulation. First, as the district court acknowledged (App. A, *infra*, 5a; emphasis in original; footnote omitted): "[t]he historical record *is not* one of predominately [*sic*] public ownership and operation of transit services." Second, although there has been a marked shift toward public sector operation of mass transit in recent years, that shift was greatly assisted and accelerated by the availability of substantial federal grants under the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.* Finally, in entering the field of mass transportation, the states and their subdivisions have chosen to participate in a form of commerce already subject to federal legislation governing significant aspects of the employment relation. Each of these factors serves to distinguish this case from *National League of Cities* itself.

For the foregoing reasons, and because the district court's decision holding the Fair Labor Standards Act unconstitutional as applied to public transit employment will deprive a subtantial number of employees of the protections Congress has established, review by this Court is warranted.

1.a. In *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852 (emphasis added), this Court held that the 1974 amendments to the FLSA that extend minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of *traditional* governmental functions." [14] As indicated above (pages 4-5), the Court did

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[14] The Court repeatedly characterized as "traditional" the state activities upon which the federal legislation was deemed impermissibly to intrude. See, *e.g.*, 426 U.S. at 849 "[t]he degree to which the FLSA amendments would interfere with traditional aspects of state sovereignty * * *"), 851 & n.16 ("activities * * * within the area of traditional operations of state and local governments" and "services which the States have traditionally afforded their * * * citizens"), 855 ("those governmental services which the

not purport to provide an "exhaustive catalogue" of local governmental activities that fall within the protected sphere.

In *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the Court recapitulated the holding of *National League of Cities*, stating (*id.* at 287-288; footnote omitted; emphasis in original):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.* at 852.[15]

Most recently, the Court has emphasized that "[t]he principle of immunity articulated in *National League of Cities*" does not create "a sacred province of state autonomy" but instead is a "functional doctrine" tailored to "ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence,' [*National League of Cities* v. *Usery*, *supra*, 426 U.S.] at 845 (quoting *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)), not be lost through undue federal interference in certain core state functions." *EEOC* v. *Wyoming*, *supra*, slip op. 8-9.

States and their political subdivisions have traditionally afforded their citizens").

[15] Even where these three requirements are met, a Tenth Amendment challenge to legislation under the Commerce Clause may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." 452 U.S. at 288 n.29. See also *United Transportation Union* v. *Long Island R.R.*, *supra*, 455 U.S. at 684 n.9.

b. Contrary to the view of the district court (App. A, *infra*, 6a, 11a-17a), provision of mass transit services is distinguishable in critical respects from "core state functions" such as public education, safety, health, sanitation, parks, schools and hospitals. First, mass transit is not a traditional local government function. As the district court acknowledged (*id.* at 5a; emphasis in original; footnote omitted): "The historical record *is not* one of predominately [*sic*] public ownership and operation of transit services." Until the 1960's mass transit had been predominantly part of the private sector. At the time of World War II, only 20 street railways and bus systems, carrying 7% of the nation's transit riders, were in public ownership. American Public Transit Association, *Transit Fact Book 1981*, at 27.[16] In 1960, only 64 of the 1251 transit systems extant were publicly owned. *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 27 (1963) (testimony of Robert Weaver). Mass transit then was still a private enterprise in many of our nation's largest cities, including Atlanta, Baltimore, Buffalo, Cincinnati, Dallas, Denver, Houston, Milwaukee, Minneapolis, New Orleans, Pittsburgh, St. Louis, San Diego and Washington, D.C. *Id.* at 313 (testimony of George W. Anderson, Executive Vice President, American Transit Association).

To be sure, subsequent to the enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V)

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[16] The 1978-1979 edition of the same reference cites the figure of 35 systems in public ownership, but does not vary the percentage of riders carried. *Transit Fact Book* 55. We note with interest that APTA, without material revision in the underlying historical data, has revised its assessment of these facts. The earlier edition of the *Transit Fact Book* concludes that "[p]ublic ownership of transit is a recent development" (*ibid.*). The 1981 edition reverses that judgment, stating: "Public ownership of transit is not a recent development." *Transit Fact Book 1981, supra*, at 27.

1601 *et seq.*, which made substantial federal funds available to local governments for mass transit (see pages 6-7, *supra*, and pages 18-21, *infra*), the trend toward public ownership of transit substantially accelerated. By 1967 over 50% of all transit riders patronized publicly owned systems. *Transit Fact Book 1981*, *supra*, at 27. The latest available information is that slightly over half the operating systems, carrying over 94% of the riders, are now publicly owned.[17] However, many of the cities that have acquired transit systems have contracted out responsibility for operation of these systems to private transit management companies, which are in some cases the very companies that previously owned the systems. Of the 350 publicly owned systems in urbanized areas, more than 120 (including some of the larger systems) are privately managed.[18]

As these statistics indicate, mass transit cannot be deemed "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 855 (footnote omitted)).[19] Nor does the recent trend toward public owner-

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[17] As late as 1981, 336 of the nation's 686 urban mass transit systems and 91 of 339 systems in rural areas were still privately owned. U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 19 (Aug. 1981); U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (Feb. 1981).

[18] U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas over 50,000 Population*, *supra*, at 19.

[19] Indeed, part of the justification for singling out public transit workers for FLSA coverage in 1966, at a time when public employees generally were not within the Act's protection (see pages 2-3 & n.4, *supra*), was to eliminate the competitive advantage that public transit systems had enjoyed over private systems since the latter had been covered by the Act in 1961. See S. Rep. No. 1487, 89th Cong., 2d Sess. 8 (1966).

ship of local transit services justify extension of state immunity under the FLSA to these services. In *United Transportation Union* v. *Long Island R.R.*, *supra*, the Court held that application of the Railway Labor Act to govern labor relations of a state-owned commuter railroad does not trench impermissibly upon state sovereignty. The Court acknowledged that "some passenger railroads have come under state control in recent years" but emphasized that "that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments." 455 U.S. at 686 (emphasis in original). The Court accordingly concluded (*ibid.*):

> Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.

That conclusion is equally applicable to local public transit systems.

c. The district court acknowledged that mass transit service has traditionally been operated by private enterprise rather than local government. The court reasoned, however, that other transportation activities such as road-building were historically carried out by states (App. A, *infra*, 4a) and suggested that "[m]ass transit is an integral component of a state's transportation system" (*id.* at 5a). But the same could equally have been said of the commuter railroad in *Long Island Rail Road*. Plainly, *National League of Cities* does not require that all forms of transportation be treated as a single service in determining whether application of the wage requirements of the FLSA to public transit operations impairs a state's sovereignty.

The district court's alternative rationale was that historic state *regulation* of local transit service suffices to render mass transit "traditionally * * * a state prerogative and responsibility" (App. A, *infra*, 6a). The court declared (*ibid.*):

> That states chose to leave ownership and operation in private hands and to effect their interest through regulation does not negate the inference of sovereignty that arises from history.

This reasoning, which fundamentally misconceives the premise of *National League of Cities*, cannot be reconciled with this Court's decisions. Congress' authority to override state regulation by exercise of its commerce power is well established and is not limited by considerations of state sovereignty. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*, 452 U.S. at 289-292. Thus, preemption of state regulatory authority by enactment of the FLSA amendments of 1961, 1966 and 1974 did not run afoul of the Tenth Amendment. Cf. *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 397-398 (1951). A history of state *regulation* of private transit enterprise simply cannot be regarded as the equivalent of state *operation* of transit services for this purpose and provides no predicate for treating transit services recently taken over by a public entity as a traditional and essential element of state sovereignty. Cf. *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436-437 (1980) ("The basic distinction drawn in [*Hughes* v.] *Alexandria Scrap* [*Corp.*, 426 U.S. 794 (1976)] between States as market participants and States as market regulators makes good sense and sound law"); *White* v. *Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983), slip op. 3.[20] Indeed, the states' fundamental policy choice

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[20] In *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Laboratories*, No. 81-827 (Feb. 23, 1983), the Court observed that "[t]he retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty," and declared that such state proprietary activities are subject to federal Commerce Clause legislation. Slip op. 3 n.6, quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*, 452 U.S. at 288. Yet regulation of retail drug sales by private pharmacists (to the extent not preempted by federal law) is assuredly a traditional police power function. See *Whalen* v. *Roe*, 429 U.S. 589, 596-598 (1977). Plainly, the Court did not regard such regulation and direct market partici-

to pursue their objectives through regulation of nongovernment transit providers rather than direct market participation eloquently testifies that, since the inception of the industry, operation of local transit has "not [been] an area that the States have regarded as integral parts of their governmental activities" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 854 n.18).[21]

d. The district court's decision is also inconsistent with *Helvering* v. *Powers*, 293 U.S. 214 (1934). There this Court held that the Board of Trustees of the Boston Elevated Railway Company, a quasi-public street railway enterprise, could not share in the intergovernmental tax immunity of the State of Massachusetts (*id.* at 227):

> [T]he State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [These circumstances] cannot be said to furnish a ground for immunity.

The Court's reasoning in *Powers* is fully applicable here.[22]

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pation by the state as interchangeable for purposes of Tenth Amendment analysis.

[21] Contrary to the district court's suggestion (App. A, *infra*, 6a), states are not free "to select the most suitable means to accomplish their goals in areas of unique and special concern to them." A similar argument was presented, without success, in *Long Island Rail Road*, 80-1925 Resp. Br. 11, 13-14, 27-28. And *EEOC* v. *Wyoming* expressly rejects the contention that *National League of Cities* artificially delimits a "sacred province of state autonomy." Slip op. 9.

[22] In *National League of Cities*, the Court rejected the contention that "'the activities in which the states have traditionally engaged,'" which had been held to mark the "'boundary of the restriction upon the federal taxing power,'" do not supply a like "'limitation upon the plenary power to regulate commerce.'" 426 U.S. at 854, quoting *United States* v. *California*, 297 U.S. 175, 185 (1936). But nothing in *National League of Cities* suggests that Congress'

2. In *Long Island Rail Road*, the Court stated that historical evidence is of paramount importance in the fundamental inquiry as to which state functions are "traditional" for purposes of Tenth Amendment immunity. 455 U.S. at 686-687. The historical evidence recounted above (pages 13-14), and the Court's holding in *Long Island Rail Road*, provide a clear answer to this inquiry in the case of mass transit. But even if these factors were not dispositive, the circumstances under which the recent growth of public ownership of local transit systems occurred confirms that application of the FLSA to public transit employment does not intrude impermissibly upon functions that are essential to the separate and independent existence of the states.

a. The recent conversion of transit systems from private to public ownership was by no means a local phenomenon. Rather, that shift was spurred by enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, which made available substantial federal financing for public acquisition of private systems and construction of new systems and facilities. By 1964 Congress had recognized the "deterioration or inadequate provision of urban transportation facilities and services" (49 U.S.C. 1601(a)(2)) and had concluded that "[m]ass transportation needs have outstripped the present resources of the cities and States, and [that] a nationwide program can substantially assist in solving transportation problems." H.R. Rep. No. 204, 88th Cong., 1st Sess. 4 (1963). See also *Jackson Transit Authority* v. *Local 1285, Amalgamated Transit Union*, No. 81-411 (June 7, 1982), slip op. 1-2. The UMT Act established a framework "to provide assistance to State and local governments and their instrumentalities in financing [mass transit] systems, to be operated by public or private mass transportation companies as determined by lo-

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power to regulate commerce is *more* limited than the power to tax state activities. See 426 U.S. at 843-844 n.14.

cal needs." 49 U.S.C. 1601(b)(3). Under the provisions the UMT Act, local government bodies with transit responsibilities are eligible to receive federal grants defraying as much as 80% of their capital outlays, including the costs of acquiring local private systems and making capital improvements in them, and up to 50% of their operating deficits. 49 U.S.C. (& Supp. V) 1603(a), 1604(e). By 1978 more than $13 billion in federal aid to transit had been awarded under the UMT Act and other federal programs. *Transit Fact Book*, *supra*, at 57. As indicated above (pages 6-7), both SAMTA and its predecessor, the San Antonio Transit System, were beneficiaries of substantial federal financial assistance.

The enactment of the UMT Act heralded the substantial expansion of the state and local governmental role in providing urban transit described above (pages 13-14). Although it is impossible to state with assurance what would have happened had federal funding not been made available, there is reason to believe that many cities would not have entered the transit business; certainly they had not generally undertaken to perform that service before the advent of federal financing.[23] See, *e.g.*, *Alewine* v. *City Council*, *supra*, 699 F.2d at 1063 ("Augusta stipulated that had it not been for the federal grant, it would not have purchased the assets of the Augusta Coach Company").

Thus, the transfer of responsibility for providing local transit service established not a new integral aspect of state or local government, but a classic venture in "cooperative federalism" in which the states and their subdivisions are free, but are not compelled, to join. See *FERC* v. *Mississippi*, No. 80-1749 (June 1, 1982), slip op. 21-24; *Hodel* v. *Virginia Surface Mining & Reclama-*

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[23] As of September 1976, some 115 cities had used UMT Act funds to acquire local private bus systems. F. Siskind and E. Stromsdorfer, *The Economic Cost Impact of the Labor Protection Provisions of the Urban Mass Transportation Act of 1964*, at 9-11 (May 1978).

tion Ass'n, supra, 452 U.S. at 289; *Bonnette* v. *California Health & Welfare Agency*, Nos. 81-4565 & 82-4174 (9th Cir. May 5, 1983), slip op. 15-16; *In re Glidden*, 653 F.2d 85, 88 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982).[24] Given the critical role played by the federal government in the development of the national public transit industry, it can hardly be claimed that, although nontraditional, operation of mass transit by the states and localities has become essential to the states' separate and independent existence. As the Sixth Circuit has remarked: "It would indeed be peculiar to hold that federal aid for transit created a situatior where a state which provides transit service is immune from federal labor regulations."

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[24] The federal role in mass transit was not limited to incentives for the substitution of public agencies for private companies, or for the modernization of existing systems. Prior to the enactment of the UMT Act, "[a]s suburban development increased, the tendency was for each community to maintain its political and fiscal individuality and shun comprehensive urban transportation planning." American Public Works Association, *History of Public Works in the United States 1776-1976*, at 178 (1976). The UMT Act, however, was intended to "encourage the planning and establishment of *areawide* urban mass transportation systems." 49 U.S.C. 1601(b)(2) (emphasis added). Congress made funding available for a project only if it was designed as part of a comprehensive area-wide plan, meeting federal criteria for improved transportation, and provided that grants could only be made to public agencies that have the legal and financial authority to carry out such projects. See 49 U.S.C. (Supp. V) 1602(a)(2)(A), 1604(b), 1604(g), 1607; H.R. Rep. No. 204, *supra*, at 14. By means of these requirements, local governments were induced, in many instances for the first time, to band together and to create metropolitan transit systems spanning the entire urban area. For example, appellee SAMTA was created in 1978 to serve Bexar County, Texas, pursuant to Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Cum. Supp. 1982), which authorized creation of metropolitan area-wide transit authorities. Article 1118x was first enacted in 1973.

We note that a significant number of area-wide transit systems operate across state lines. See 49 U.S.C. 1601(a)(1); H.R. Rep. No. 204, *supra*, at 5. Such systems can scarcely be considered outside the scope of federal commerce power legislation.

Dove v. *Chattanooga Area Regional Transportation Authority*, *supra*, 701 F.2d at 53.

b. The district court concluded that federal funding is irrelevant to the question of intergovernmental immunity (App. A, *infra*, 13a-16a). The court below reasoned that: (1) federal subsidies are an exercise of Congress' Spending Power rather than its Commerce Clause authority, (2) federal monies support many of the functions treated as core aspects of sovereignty in *National League of Cities*, and (3) federal funding, especially because it is variable, cannot measure the extent of a state's Tenth Amendment immunity. It is immaterial, however, that federal funding for mass transit does not itself rest upon Congress' Commerce Clause authority. Federal funding is pertinent in this case not because it supplies the constitutional basis for imposing conditions directly upon the states, but because involvement of the federal government in the growth of public transit is a historical fact that indicates that public transit has not become an essential aspect of the states "*separate* and *independent* existence" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 851; emphasis added).

Moreover, the role played by federal funding and other requirements of federal law in the public transit industry (see page 20 note 24, *supra*) is quite different from that of federal subsidies supporting traditional local government functions. To be sure, federal monies are available for certain education, public safety, and public health activities undertaken by the states. But the federal share of total local expenditures in these areas is generally less significant than the federal share of expenditures in public transit, particularly in respect to capital costs. And, as noted above, more important than the level of federal assistance is the special role of that assistance as catalyst in the transformation of mass transit from the private sector to the public sector in many localities. There is no similar pattern of transformation of the activities treated as traditional government functions in *National League*

of Cities. On the contrary, those services were provided by virtually every municipality long before federal assistance became available.

c. The recent growth of public ownership in the mass transit industry serves to differentiate public transit from the governmental activities addressed in *National League of Cities* in yet another respect. The states and their subdivisions entered the fields of police and fire protection, public health and sanitation services, hospitals and schools long before the enactment of federal legislation governing terms of employment. And for more than 30 years after the FLSA was enacted Congress recognized the prerogatives of the states in these spheres. The vice of the 1974 amendments to the FLSA thus was the abrupt federal intrusion affecting the entire range of settled patterns of local and state government administration. See 426 U.S. at 845-852; *EEOC* v. *Wyoming*, *supra*, slip op. 12-13.

In contrast, employment relationships in the private transit industry had long been the subject of federal regulatory legislation under the Commerce Clause when, in the 1960's, local governments began in large numbers to acquire transit systems. The nation's basic labor-management relations statute, the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, enacted in 1935, applies to the private transit industry just as it does to other industries affecting commerce. See *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 (1951); *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963).[25] Moreover, as Congress expanded the scope of national labor legislation, it applied a broad range of federal laws to the private transit

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[25] In *Bus Employees* v. *Wisconsin Board*, *supra*, 340 U.S. at 397-398, the Court rejected the claim that the substantial local interest in the affairs of a private bus company, operated as a public utility under state regulation, precluded application of the NLRA to a labor dispute between the utility and its employees, explaining that "these questions are for legislative determination" (*id.* at 397).

industry, including the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.* (reporting requirements); the Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, Section 2(c), 75 Stat. 65-66, 29 U.S.C. (1964 ed.) 203(r) and (s)(2), (minimum wage and child labor standards); the Equal Pay Act of 1963, 29 U.S.C. 206(d) (equal pay for women for equal work); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (prohibition against employment discrimination on the basis of race, sex, creed, or national origin); and the Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Sections 102(a), 206(c), 80 Stat. 831, 836, 29 U.S.C. (1970 ed.) 203(r)(2), 213(b)(7) (minimum wage; overtime pay for non-operating employees). These statutes reached the majority of all transit systems, 90% of which were, in 1967, still privately owned. *Transit Fact Book*, *supra*, at 38. Thus, when they acquired private transit companies, state and local governments entered an industry in which employment relations were subject to established federal legislation.

Because of this significant federal regulatory presence, by deciding to operate a mass transit system a municipality "subjects itself to that regulation." *Parden* v. *Terminal Ry.*, 377 U.S. 184, 196 (1964); *New York* v. *United States*, 326 U.S. 572, 582 (1946) (opinion of Frankfurter, J.). This principle was recently reaffirmed in *Long Island Rail Road*. Citing the history of federal regulation of the private rail industry, the Court declared (455 U.S. at 687):

> [T]here is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.

See also *Kramer* v. *New Castle Area Transit Authority*, *supra* (677 F.2d at 310) ("since it is undisputed that

the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area"); *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d at 53.

The district court concluded, however, that exemption of public transit employment from the requirements of the FLSA would not entail the kind of erosion of federal authority condemned in *Long Island Rail Road* (App. A, *infra*, 6a-11a). The court noted that the FLSA was not applied to private transit until 1961 or to public transit until 1966 and did not extend full protection to transit employees until 1974. But while Congress did not fully exercise its power to legislate respecting terms of employment in the transit industry until relatively recently, there can be no doubt that the constitutional authority to do so has long been available. If the states' acquisition of private transit operations extends intergovernmental immunity thereto, it necessarily involves an erosion of federal constitutional authority. In any event, the fact is that the FLSA *was* made applicable to the private transit industry in 1961 (and, indeed, to public transit in 1966) —before the bulk of the recent conversions to public ownership took place (see pages 3 & n.4 and 13-14, *supra*).[26]

The Court in *Long Island Rail Road* did observe that railroads had long been subject to federal regulatory leg-

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[26] The fact that the overtime provisions of the FLSA were not applied to the transit industry until 1974 does not alter the analysis. Congress had plainly entered the field of wage regulation in the transit industry with the 1961 and 1966 FLSA amendments. The requirement for overtime pay is not regulation fundamentally different from that previously in place. Constitutional immunity may not be founded upon Congress' decision to regulate one aspect of wages in a given industry but not another. Cf. *EEOC* v. *Wyoming*, *supra*, slip op. 15 n.17.

islation, 455 U.S. at 687-688, but there was no suggestion that such longstanding regulation was necessary to the holding that the State of New York could not extend its immunity to a commuter railroad merely by acquiring the railroad. Although the specific federal legislation at issue here is of comparatively recent vintage, it does not follow that the freedom from such regulation of state activities of roughly contemporaneous (or still more recent) vintage is essential to the separate and independent existence of the states. Because of the Supremacy Clause, the interests of the states and those of the federal government do not stand on a par in this area. Rather, within the broad limits of Congress' power to regulate commerce, federal legislation applies to the states to the extent deemed appropriate by Congress unless it is determined, pursuant to the criteria this Court has announced, that such application entails undue interference in core state functions.

In any event, if it were necessary to show that federal regulation of employment in the transit industry was established long before the recent trend toward public operation of mass transit, the longstanding application of the National Labor Relations Act to the transit industry supplies the necessary predicate. Indeed, in *Long Island Rail Road* the Court's recitation of the long history of federal railroad legislation was concerned primarily with regulatory schemes other than the Railway Labor Act (RLA), the statute directly in issue there. See 455 U.S. at 687-688. Like the railroad industry, local transit has long been the subject of significant federal statutory regulation.[27] Accordingly, to hold that the FLSA, which ex-

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[27] The district court suggested (App. A, *infra*, 9a, 10a) that statutes such as the NLRA are irrelevant here because Congress itself exempted local government employers from their reach. But the issue is not, as the district court thought (*id.* at 9a), whether "any diminution of federal authority under the NLRA that results from a private to public conversion is * * * consistent with congressional intent." Rather, the NLRA is instructive because it evidences that

pressly covers public transit employment, impermissibly interferes with state sovereignty is to sanction "ero[sion] of federal authority in [an] area[] traditionally subject to federal statutory regulation" (*United Transportation Union* v. *Long Island R.R., supra*, 455 U.S. at 687).[28]

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the transit industry has "traditionally [been] subject to federal statutory regulation" (*United Transportation Union* v. *Long Island R.R., supra*, 455 U.S. at 687). In examining the succession of federal statutes that historically governed commerce by rail, the Court in *Long Island Rail Road* did not pause to inquire whether particular statutes were applicable to publicly operated railroads. The relevance of these statutes was not that they established long-standing regulation of publicly owned railroads; it was sufficient that they established regulation of the heavily private railroad industry. Against this background of federal regulation of the railroad industry, the Court concluded that the RLA, which expressly covers state owned commuter railroads (see 455 U.S. at 682 n.4), does not intrude impermissibly upon matters of state sovereignty. A similar analysis is applicable here. Although Congress has not chosen to apply the NLRA to publicly owned transit systems, Congress has, through the NLRA and other statutes, established extensive federal regulation of labor relations in the transit industry.

[28] Like the district court, our analysis proceeds in terms of the history and role of public operation of transit service generally, rather than upon the specific history of SAMTA. As the Court explained in *EEOC* v. *Wyoming, supra*, slip op. 13, the scope of intergovernmental immunity does not depend upon the special facts of particular cases "which may vary from State to State and time to time, but on a more generalized inquiry, essentially legal rather than factual." See also *Helvering* v. *Powers, supra*, 293 U.S. at 227. The issue requires a uniform nationwide rule based upon national patterns. See *Alewine* v. *City Council, supra*, 699 F.2d at 1068-1069; *Kramer* v. *New Castle Area Transit Authority, supra*, 677 F.2d at 309-310.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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